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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 208.

JARIB L. SANDERSON, SURVIVING PARTNER OF THE FIRM OF BARLOW, SANDERSON & CO., APPELLANT,

vs.

THE UNITED STATES AND THE CHEYENNE TRIBE OR NATION OF INDIANS, APPELLEES.

REPLY BRIEF FOR APPELLANT.

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REPLY BRIEF FOR APPELLANT.

Counsel for appellees have devoted considerable time to a demonstration of the right of the Court of Claims to allow, at a subsequent term, a motion for new trial (under its ordinary jurisdiction) filed during the term at which judgment was rendered.

The Court of Claims files findings of fact analogous to the verdict of a jury, and has adopted the practice of rendering judgment thereon forthwith. This is the usual, although not the universal, practice of that court.

The general subject of new trials is not provided for by statute, but the court has always assumed, and with unquestionable propriety, the common-law powers of a court of record to review its acts upon proper motion. It has always, however, maintained the necessity for action to be taken

during the term at which judgment is rendered, to prese
its control over the cause, which otherwise would pass beyo
its further jurisdiction.

Sampson *v.* U. S., 36 C. Cls., 194 (195).
Campbell *v.* U. S., 19 C. Cls., 426.
Wade *v.* U. S., 21 C. Cls., 142.
In re McKay, 30 C. Cls., 1.
Murdock *v.* District of Columbia, 23 C. Cls., 43.
Russell *v.* U. S., 15 C. Cls., 168 (173).
Seat *v.* U. S., 18 C. Cls., 458 (468).

In holding that by the entertaining of a motion for n
trial made during the term it might extend its jurisdicti
of the cause beyond the term, it but follows the ordinary r
maintained by the courts in the absence of statutory prohi
tion.

Bronson *v.* Schulten, 104 U. S., 410.

It is the practice of the Court of Claims, on the last day
each term, to enter a general order of continuance of
pending motions, and this is held sufficient to carry jurisd
tion to determine such matters over to the next ensui
term.

In Campbell *v.* U. S., *supra*, the court discussed this qu
tion generally, and after quoting from Bronson *v.* Schult
supra, said:

> "From this we infer that if in the Supreme Co
> a motion be made *during the term at which a ju*
> *ment is rendered*, to set aside, modify, or correct t
> judgment, and that motion be continued to a s
> ceeding term, the court may, at the succeeding ter
> sustain it for sufficient cause."

In the present case this rule cannot be claimed to app
because the expiration of the two-year period was not coin
dent with the expiration of a term of the court.

But there is no analogy between ordinary motions

new trial and those filed under Revised Statutes, section 1088. The first class exists by virtue of the inherent power of courts over their orders and proceedings during the term and while *in fieri;* the second is a special statutory right to review, under certain named conditions, their judgments, which have already, in every other particular, passed beyond their jurisdiction.

Discussion of the question of the limitation of the court's action in respect to time, in so far as authority or precedent is concerned, relates to cases arising under statutes affecting these two classes of motions—the first where by statute the right otherwise existing is directed to be exercised within a certain time; the second where the statute creates a right not recognized by the principles of the common law. Special proceedings similar to those authorized by section 1088 are provided for in the statutes of many of the States. The distinction between the two classes of motions is more apparent in ordinary courts, where, as under the common law, in the first class (motions after verdict and before judgment) there is no final judgment or disposition of the cause until after the motion has been decided.

An important difference governing the construction of these two classes of statutes, the one directing the court to dispose of the ordinary motion for new trial within a fixed time and the other authorizing the court to vacate upon certain grounds and within a certain time a judgment which, tested by the ordinary rules, has become final, arises from the fact that, in respect to the former, the statute has, in derogation of the common-law right of the moving party, reduced and restricted his right otherwise existing, and in the latter it has, in derogation of the common-law right of the other party, created a right with certain conditions and limitations. In the first time is regulated with respect to a matter of procedure; in the second time is prescribed as a period of limitation.

It is only in a few of the States that statutes have required

the court to dispose of a motion for new trial before judgment within a fixed time.

In the Colorado case, cited on pages 16 and 17 of the Brief for Appellees, the court was probably influenced by the language of the particular statute and by the fact that they still retained jurisdiction over the cause, no final judgment having been entered on the verdict, as they say:

> "We are of the opinion that the proceedings at the April term, subsequent to the findings, operated to reserve the case for further consideration, and to continue the jurisdiction beyond that term. No judgment was entered at the April term, and no direction by the court to enter judgment was given at that term."

In this case the Colorado court cited no authority other than certain California decisions upon a statute wholly different. The California statute provided—

> "Upon the trial of a question of fact by the court its decision must be given in writing and filed with the clerk within twenty days after the cause is submitted for decision, and unless the decision is filed within that time the action must be tried again."

The case cited and relied on by the Colorado court, McQuillan *v.* Donahue, 49 Calif., 157, held that the provision for a written decision was directory merely, the decision having been rendered orally within the twenty days and no written decision having ever been filed by the judge. This was probably because the statute provided for the granting of a new trial as a penalty for failing to decide within the time limit only, and was silent as to the effect of a failure to deliver a written decision.

Statutes Fixing Time for Decision on Motion for New Trial Before Judgment are Mandatory.

Although a statute fixing a limit to the time for the court to act on a motion for new trial restricts the common-law right of the moving party, and therefore entitles him to a liberal construction of the statute in his favor, it is held by the great weight of authority that even in this class of cases the court has no jurisdiction over the motion beyond the time fixed for decision.

Recent cases involving this question are Clements *v.* Buckner (Tex., 1904), 80 S. W., 235, cited on our original brief, and Turner *v.* Davis (1903), 132 N. Car., 187.

Clements *v.* Buckner, *supra*, holds that the provisions of Texas Revised Statutes (1895), article 1374, that motions for new trial shall be determined at the term at which such motions are made, is mandatory, and that the act of the judge continuing such a motion to a subsequent term is without jurisdiction and void.

Turner *v.* Davis, *supra*, holds that section 412, paragraph 4, of the North Carolina Code of Civil Procedure (1883) deprives the court of jurisdiction to hear the motion for new trial beyond the trial term, although the court had passed an order continuing the motion to the succeeding term.

Other cases involving the same question are cited on pages 14 and 15 of appellant's original brief.

Conditions Expressed in Statutes Authorizing Allowance of New Trial After Judgment Are Limitations on Power of the Court.

In the original brief of the appellant we cited certain cases wherein the question arose on statutes affording relief to the unsuccessful litigant by a motion for new trial after

the judgment had, except for this special statutory remedy, become final. These cases were—

Vaughn *v.* O'Connor, 12 Nebr., 478.
Fergus *v.* Wesler, 35 Ind., 53.
Hays *v.* May, 35 Ind., 427.
Crews *v.* Ross, 44 Ind., 481.

In Fergus *v.* Wesler, *supra*, the statute (Statutes of Indiana, 1870, containing Revised Statutes of 1852, with subsequent amendments, vol. 2, page 283), provided that—

> "SEC. 601. The court rendering the judgment, at any time within one year thereafter, upon the application of the party against whom judgment is rendered, his heirs or assigns or representatives, and upon payment of all costs, and of the damages, if the court so direct, shall vacate the judgment and grant a new trial."

In holding that the period of one year was a limitation upon the jurisdiction of the court to grant relief under this section, the court said:

> "Within a year of the rendition of the judgment, the appellant paid the costs and filed in the clerk's Office a motion for a new trial, as of course, under Sec. 601 of the Code. * * * There matters rested until more than a year after the rendition of the judgment, when the appellant moved the court in term time, on the written application filed in vacation, to vacate the judgment and grant him a new trial, as of right. The appellee objected to the new trial for the reason that more than one year had elapsed since the final judgment was rendered; and the court sustained the objection, and overruled the motion for new trial. This ruling was assigned for error. There was no error in this. The party who seeks a new trial under Sec. 601 of the Code must pay the costs, make application to the *court*, get the order granting a new trial, or its refusal to do so, within one year after the judgment is rendered, or he will be too late in such a proceeding as this."

This was the unquestioned interpretation of this statute until, in the revision of 1881 (Rev. Stat. of 1881, sec. 1064), the legislature of Indiana changed the statute to read as follows:

> "The court rendering the judgment, on application made within one year thereafter by the party against whom judgment is rendered, * * * shall vacate the judgment and grant a new trial."

This statute related, moreover, to the granting of a new trial of right, where the court had no discretion. The delay of the court to act in such a case as Crews *v.* Ross, *supra*, was undoubtedly a great hardship upon the moving party, and occasioned the change in the law.

Cases Not Cited on Original Brief.

The Illinois Revised Statutes of 1845, chapter 36, section 30, contain a provision relating to the granting of new trials as of right, similar to the Indiana statute. This statute was supplanted by a somewhat different provision of the Revised Statutes of 1874, chapter 45, section 35.

Under the statute of 1845, Chief Justice Treat, in the case of Emmons *v.* Bishop, 14 Ill., 152 (1852), held that the filing of the motion within the year was not sufficient. He said:

> "He must ask for and obtain a new trial within the year. If he does not, he waives the benefit of the statute. He may take a new trial at the term at which the judgment is entered; and if he omits to do so, he runs the risk of not having another opportunity to do so during the year."

Statutory provisions very similar to U. S. Revised Statutes, section 1088, exist in a number of the States. Section 5298 of the Revised Code of Civil Procedure of North Dakota provides that—

> "The court may * * * in its discretion and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect."

In Sargent *v.* Kindred, decided by the Supreme Court of North Dakota in May, 1906 (9 N. Dak., 472), this statute was held to fix a limitation upon the action of the court. The opinion states:

> "We desire to place our decision on another ground. While the motion appears to have been made within a year after the defendant himself had actual knowledge of the entry of judgment, it was neither decided nor submitted to the court until after the expiration of more than a year from the time the defendant knew of such judgment. It is not enough that the motion is made within the year under section 4939, Comp. Laws. It must be made and submitted and the order granting the relief must also be made within the year. The language of the statute is explicit. It declares that the court shall have the power to relieve a party from a judgment at any time within one year after notice thereof. It is not enough to satisfy the language of the statute that the application for relief is made within the year, or that it is submitted within the year. But the court must take action within the year. It is true that a court to prevent prejudice to a suitor through its own delays, has power to direct that the order granting the relief be entered *nunc pro tunc* as of the time the motion was finally submitted.
>
> "In this way all possible injury to the litigants from the failure of the court to decide a motion of this character within the year may be prevented, provided the party has brought his motion to a hearing within the statutory time. * * *
>
> "In placing a construction on the statute in question we must keep in mind not only its language, which is very clear, but also the fact that it extends to the defeated party an extraordinary indulgence

> even in the theory that he must both move and submit his motion within the year. The statute vests in him a new right, and *he must take it burdened with the limitations found in the statute itself.*"

The right of the court to make a *nunc pro tunc* order is discussed *obiter,* and we would seriously question the legality of such an act. No such power has been recognized in Wisconsin and Oregon, where statutes exist identical in language (Rev. Stat. Wisconsin (1858), ch. 125, sec. 38; Hills' Code (Oregon), sec. 102).

In McKnight *v.* Livingston, 46 Wisc., 356 (1879), the Supreme Court of Wisconsin construed this statute to require the action of the court to be taken within the time stated or not at all. It said:

> "It is very clear that the court made no order, either orally or in writing, vacating and setting aside the judgment, until after the expiration of more than one year after the defendant making the motion had notice of such judgment. The record does not disclose that the delay in making the order was occasioned by the request of the plaintiffs; and we must presume, therefore, that it was the act of the judge of the court, without the request of either party." * * *

(After quoting the statute.)

> "The plain reading of the statute is, that the court may grant the relief indicated within one year after the party asking such relief has notice of the judgment, order or other proceeding against which he seeks relief. The law is one which grants powers not before exercised by the courts, and fixes a limit to the time within which such powers may be exercised.
>
> "The right to exercise this power at all is conceded to be conferred only by this statute. And it seems equally clear that such power must therefore be exercised within the time fixed by the statute for that purpose * * *

> "It is argued that the party cannot compel a decision of his application, in case the judge should delay in giving it. * * * But practically there is no difficulty in the matter. It is not to be presumed that any of the judges of the courts of this State would refuse to decide a question of this nature promptly, if they were desired to do so and were cognizant that any delay would prejudice the rights of the parties."

The Oregon statute was before the Supreme Court of that State on the same issue in Nicklin *v.* Robertson, 28 Ore., 278, decided in December, 1895. After discussing the question at some length the opinion concludes:

> "These authorities conclusively show that the statute limits the power to one year after notice of the 'judgment, order or proceedings,' and that the expiration of that time leaves the court without authority to set aside or modify its decision for any of the causes enumerated in the section quoted."

Under a similar statute, in Gerish *v.* Johnson, 5 Minn., 23, an appeal from an order overruling such a motion, the record showed that the motion was not heard until a year and two months after the judgment was entered, and the court said:

> "This alone was sufficient ground for the court below to deny the motion."

A similar construction is maintained by the California decisions (Moore *v.* Supreme Court, 86 Calif., 495).

An examination of the authorities shows that in every reported case which we have been able to discover, where statutory provisions authorize a court upon application of a party against whom a final judgment has been rendered to vacate the same within a fixed period of time, it has been held that the time fixed is the limit of jurisdiction.

This principle may well be regarded as founded on the

well-settled rule that the judgment of a court, rendered at any other time or place than that directed by law, is absolutely void.

"It is essential to the validity of a judgment that it be rendered at the time * * * prescribed by the law."

(Extract from opinion of Terry, Ch. J., in Wicks *v.* Ludwig, 9 Calif., 153.)

In Lawrence *v.* Cannavan, 76 Conn., 303, the question arose on the validity of a judgment rendered at the second term subsequent to the trial. The Statute invoked by the appellant was as follows:

> "Any judge of the superior court or of the court of common pleas, who shall have commenced the trial of any civil cause, shall have power to continue such trial and render judgment after the expiration of the term or session of the court at which such trial commenced; but such trial shall be ended and judgment rendered before the close of the next term or session."

The court, in reversing the judgment, said:

> "Under this section the Court of Common Pleas could, therefore, even against the objection of the parties, have heard the arguments in this case and decided it at any time before the close of the November term, which might by law have been continued until the first Monday of January, 1903. After that date the judgment could not have been properly rendered without the consent of the parties, either express or implied."

Section 3015 of the New York Civil Procedure (1893—Banks & Bro., Ed.) provides, with reference to the time for rendering decisions in certain cases—

> "In every other case, he must render judgment and enter it in his docket book, within four days after the cause has been finally submitted to him."

In Orvis *v.* Curtiss, 28 N. Y. Supp., 728, where the judgment was rendered after the time so fixed, the court says:

> "The justice had no jurisdiction to render the judgment he did in this case, because he rendered it after the time limited by law for his doing so."

The same principle has been declared in—

Kidd *v.* Burke, 142 Ala., 625.
Jackson *v.* State, 102 Ala., 76.
Brumley *v.* State, 20 Ark., 77.
Galusha *v.* Butterfield, 3 Ill., 227.
McCool *v.* State, 7 Ind., 378.
White *v.* Riggs, 27 Me., 114.
Holman *v.* Hogg, 83 Mo. App., 370.
American Fire Ins. Co. *v.* Paffe, 4 Okla., 110.

Many other cases might be cited to the same effect.

Decisions of the Court of Claims.

The only case in which this question appears to have been directly raised is Belloque *v.* U. S., 13 C. Cls., 195. That case was fully discussed on Appellant's Brief (pp. 9-12).

Appellees contend that this decision has been followed in a large number of cases, but they do not show that there was a single other case in which it was followed, from the date of the act of 1868 (now R. S., 1088) until 1896, when, motions having been filed simultaneously in the case at bar and other cases were allowed under the ruling now complained of and all of these cases are now pending, awaiting the decision of this court in the present appeal, brought to test the legality of the decision. The case in which the opin-

ion was written (McCollum *v.* U. S., 33 C. Cls., 469), could not be appealed because the amount involved was less than $3,000.

It is noticeable that in every case which has come before this court on appeal, where the provisions of the Revised Statutes, section 1088, were questioned, the action of the Court of Claims had been taken within the two-year period.

Ayers *v.* U. S., 9 Wall., 608.
U. S. *v.* Crussell, 12 Wall., 175.
Ex parte Russell, 13 Wall., 664.
Ex parte Roberts, 15 Wall., 384.
Ex parte United States, 16 Wall., 699.
Young *v.* U. S., 94 U. S., 258.
U. S. *v.* Young, 95 U. S., 641.
Belknap *v.* U. S., 150 U. S., 588.

We therefore submit that the facts do not sustain the contention that this statute has received a settled construction.

The Belloque Case (13 C. Cls., 195) was decided at the December term, 1877. The case of Young, assignee of Collie (Appellant's Brief, p. 7) was decided by this court on November 26, 1877. From that time until the action complained of in this appeal, we are not aware of any case in which the Court of Claims attempted to set aside a judgment under Revised Statutes, section 1088, more than two years after entry of judgment.

Mandatory or Directory.

Counsel for appellees, however, argues that although the statute authorizes the court to act *within two years*, the statute must be considered as directory merely, because the delay of the court ought not prejudice the right of the suitor.

In the present case this would be a moot question, because no delay is charged to the Court of Claims. The court could not with all diligence have disposed of the motion within two

years, because the motion was merely filed in the clerk's office and the application was not perfected for submission to the court for action within that period.

That statutes requiring action by a court or administrative officer within a fixed time are not merely directory, because the delay of the court or officer may prejudice or take away the rights of a suitor or applicant, is well settled.

Section 11 of the Act of March 3, 1891 (26 Stat. L., 829), creating the Circuit Court of Appeals, provides:

> "That an appeal or writ of error by which any order, judgment, or decree may be reviewed in the Circuit Court of Appeals under the provisions of this act shall not be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed."

In U. S. *v.* Baxter, 51 Fed. Rep., 624, the Circuit Court of Appeals held that although the writ of error was allowed in time by the acting circuit judge, it was, without fault of the district attorney, not actually issued by the clerk until after the expiration of the six months' period, and the appeal was therefore dismissed. Judge Sanborn, who delivered the opinion of the court, cited and relied on Scarborough *v.* Pargoud, 108 U. S., 567; Cummings *v.* Jones, 104 U. S., 419, and Mussina *v.* Cavazos, 6 Wall., 355, 360.

In City of Waxahachie *v.* Coler *et al.*, 92 Fed. Rep., 284, the whole subject was carefully reviewed. In that case the plaintiff in error had done everything required to be done on his part within the six months, but the writ had not actually been issued until four days thereafter. The opinion of the Circuit Court of Appeals, delivered by Judge Pardee, concludes:

> "Whether the failure to obtain and issue the writ in time resulted from the negligence of the plaintiff in error, or was the fault of the clerk, appears to be immaterial."

We have merely suggested this line of authorities to show the error of the contention that a statute should be held directory because it requires action to be taken by a court within a fixed period of time, and the inaction of the court or its officers may result in the deprivation of the right to proceed further in the litigation. Many other illustrations might be added.

Moreover, the two-year provision of section 1088 was intended to protect the citizen who has obtained a judgment against the United States against unreasonable delay in the payment thereof. As is well known, cases come before the Court of Claims where the property of a citizen has been appropriated to the public service in violation of the constitutional provision; where money due him is wrongfully withheld, and where delay in the obtaining of prompt reparation may result in great injury. Under the law he is not even entitled to the interest upon his judgment, which would be accorded between private parties.

To hold that the statute authorizes the defendants to file a motion for new trial within two years, without disclosing the evidence upon which it is based, and, as the appellees contend, without the right to have the motion considered for two years more, inflicts not only a loss of interest, but a possible loss of evidence whereby to meet the case upon the motion. Under the practice of the Court of Claims the claimant is denied the privilege of presenting counter-evidence (Henry *v.* U. S., 15 C. Cls., 162 (165).

As this court held in French *v.* Edwards, 13 Wall., 506:

> "When the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed, or the acts done will be invalid."

The Act of August 23, 1894 (28 Stat. L., 476).

It will be seen by an examination of the whole provision, of which a part only is copied on page 3 of Appellees' Brief, that this statute is merely a direction to the executive officers of the Government. It evidently contemplated an application to the Court under Revised Statutes, Section 1088. That section must have been before the Congress when the statute was prepared, as it employs in part the same language, authorizes a motion to be filed upon the same grounds, and at the date of its passage time remained for every one of the judgments appropriated for to be acted on within two years. This, it is further shown, was the construction put upon the act by the then Assistant Attorney General, whose motion (Record, page 6) is stated to be made "in accordance with the provisions of section 1088 of the Revised Statutes of the United States."

Third Assignment of Error—Amity and Treaty Stipulation to Pay Depredations Are Not Jurisdictional.

In their argument, under the "Third assignment of error" (Appellee's Brief, pages 23 to 33), the appellees contend that the present case was not an "allowed claim" in the Interior Department at the time of the passage of the Act of March 3, 1898, and, further, that as the defendant Indians were not in amity the Court of Claims had no jurisdiction over the case.

Amity.

Before discussing the facts of the particular case, we desire to advert to the rules defined by the courts as to what constitutes a jurisdictional question.

This subject was fully discussed in Noble *v.* Union River Logging R. Co., 147 U. S., 165 (173-4). Mr. Justice Brown, delivering the opinion of the court, said:

"It is true that in every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity; such, for example, as the service of process within the State upon the defendant in a common-law action (D'Arcy *v.* Ketchum, 52 U. S., 11 How., 165 (13; 548); Webster *v.* Reid, 52 U. S., 11 How., 437 (13; 761); Harris *v.* Hardeman, 55 U. S., 14 How., 334 (14; 444); Pennoyer *v.* Neff, 95 U. S., 714 (24; 565); Borden *v.* Fitch, 15 Johns., 141); the seizure and possession of the *res* within the bailiwick in a proceeding *in rem* (Rose *v.* Himely, 8 U. S., 4 Cranch, 241 (2; 608); Thompson *v.* Whitman, 85 U. S., 18 Wall., 457 (21; 897), a publication in strict accordance with the statute, where the property of an absent defendant is sought to be charged (Galpin *v.* Page, 85 U. S., 18 Wall., 350 (21; 959); Guaranty Trust & S. D. Co. *v.* Green Cove Springs & M. R. Co., 139 U. S., 137 (35; 116). So if the court appoint an administrator of the estate of a living person, or in a case where there is an executor capable of acting (Griffith *v.* Frazier, 12 U. S., 8 Cranch, 9 (3; 471), or condemns as lawful prize a vessel that was never captured (Rose *v.* Himely, 8 U. S., 4 Cranch, 241, 269 (2; 608, 617); or a court-martial proceeds and sentences a person not in the military or naval service (Wise *v.* Withers, 7 U. S., 3 Cranch, 331 (2; 457); or the Land Department issues a patent for land which has already been reserved or granted to another person, the act is not voidable merely, but void. In these and similar cases the action of the court or officers fails for want of jurisdiction over the person or subject-matter. The proceeding is a nullity, and its invalidity may be shown in a collateral proceeding.

"There is, however, another class of facts which are termed *quasi* jurisdictional, which are necessary to be alleged and proved in order to set the machinery of the law in motion, but which, when properly alleged and established to the satisfaction of the court, cannot be attacked collaterally. With respect to these facts, the finding of the court is as conclusively presumed to

be correct as its finding with respect to any other matter in issue between the parties. Examples of these are the allegations and proof of the requisite diversity of citizenship, or the amount in controversy in a Federal court, which, when found by such court cannot be questioned collaterally (Des Moines Nav. & R. Co. *v.* Iowa Homestead Co., 123 U. S., 552 (31; 202); *Re* Sawyer, 124 U. S., 200, 220 (30; 402, 409); the existence and amount of the debt of a petitioning debtor in an involuntary bankruptcy (Michaels *v.* Post, 88 U. S., 21 Wall., 398 (22; 520); Betts *v.* Bagley, 12 Pick., 572); the fact that there is insufficient personal property to pay the debts of a decedent, when application is made to sell his real estate (Comstock *v.* Crawford, 70 U. S., 3 Wall., 396 (18; 341); Grignon *v.* Astor, 43 U. S., 2 How., 319 (11; 283); Florentine *v.* Barton, 69 U. S., 2 Wall., 210 (17; 783); the fact that one of the heirs of an estate had reached his majority, when the act provided that the estate should not be sold if all the heirs were minors (Thompson *v.* Tolmie, 27 U. S., 2 Pet., 157 (7; 381); and others of a kindred nature, where the want of jurisdiction does not go to the subject-matter or the parties; but to a preliminary fact necessary to be proven to authorize the court to act. Other cases of this description are Hudson *v.* Guestier, 10 U. S., 6 Cranch, 281 (3; 224); *Ex parte* Watkins, 28 U. S., 3 Pet., 193 (7; 650); United States *v.* Arredondo, 31 U. S., 6 Pet., 691, 709 (8; 547, 554); Dyckman *v.* New York, 5 N. Y., 434; Jackson *v.* Crawford, 12 Wend., 533; Jackson *v.* Robinson, 4 Wend., 436; Fisher *v.* Bassett, 9 Leigh, 119, 131; Wright *v.* Douglas, 10 Barb., 97, 111. In this class of cases, if the allegation be properly made, and the jurisdiction be found by the court, such finding is conclusive and binding in every collateral proceeding. And even if the court be imposed upon by false testimony, its finding can only be impeached in a proceeding instituted directly for that purpose (Simms *v.* Slacum, 7 U. S., 3 Cranch, 300 (2; 446)."

In Steel *v.* Refining Co., 106 U. S., 447 (451), the plaintiff's title depended upon a United States mineral patent.

The defense interposed was that the patent was void because, the land not being mineral land, the Interior Department had no jurisdiction to allow a mineral claim thereto. This court held that proof of the fact charged was inadmissible to attack the patent, the finding of the Land Department, although erroneous in fact, being conclusive except in a direct proceeding to vacate it, as authorized by the statutes.

In U. S. *v.* Winona & St. P. R. Co., 67 Fed. Rep., 959, Judge Sanborn, delivering the opinion of the Circuit Court of Appeals, said:

> "It is not difficult to determine whether the certificates issued in this case were void or voidable when tested by these rules. Jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. The test of jurisdiction is whether the tribunal has power to enter upon the inquiry, not whether its conclusion in the course of it is right or wrong (Foltz *v.* Railway Co., 8 C. C. A., 635; 60 Fed., 316, 318, and cases cited."

See also Dexter, Horton & Co. *v.* Sayward, 84 Fed. Rep., 296.

The question of amity is like any other question of fact submitted to the Interior Department or to the Court of Claims for determination incident to the allowance of a claim. In the award of the Department and judgment of October 11, 1892, in this case, the fact was found in favor of the claimant. Being merged into the judgment, it is like all other facts adjudicated thereby—the fact of the existence of a depredation, the citizenship of the claimant, the identity of the Indian defendants, etc.—finally determined unless proceedings are instituted to secure a reversal.

The question of amity as an incident of liability for Indian depredations was not an innovation by the Act of 1891.

It had been the requirement of the law governing allowances by the Interior Department. (See Rev. Stat., Sec. 2156.)

Amity was therefore one of the facts covered by the allowance of this case by the Department and which the Act of 1891 gave to the Attorney General the right to consider in determining whether or not the award would be reopened.

In this case the record shows that this very question was considered, that the fact of amity on the part of the defendant Indian tribe at the time of the depredation was stipulated by the counsel for claimant and defendants to be shown by the records, and that the Court of Claims accepted this stipulation of fact with the election not to reopen the award and entered judgment thereon.

We submit, therefore, that, so far as the question of amity is concerned, the argument made in our original brief under the "Third assignment of error" is equally applicable to the determination of this fact—that is, that the statute entrusted to the attorney for the defense the authority to elect to have judgment entered on the award of the Secretary of the Interior, unless *he*, the attorney for the defendants, elected to reopen the case, and that when he has in good faith entered into the stipulation found on pages 4 and 5 of the record, and judgment has thereupon been entered thereon, the court has not been invested with the power to examine into the qustion so determined, as has been attempted in this case.

Treaties With the Cheyenne Tribe.

But the appellees also contend that the allowance of the claim was beyond the jurisdiction of the Secretary of the Interior, because there was no treaty whereby they agreed to make compensation for depredations.

The direct answer to this contention is that the question raised is one of law, and the Court of Claims had no jurisdiction to entertain it under Revised Statutes, section 1088.

In re District of Columbia, 180 U. S., 250.

Relying, however, on the Mares Case, 29 C. Cls., 197, and the Labadi Case, 31 C. Cls., 205, it is contended that the treaty of October 14, 1864, did not authorize the allowance.

While we do not admit that the very narrow rule maintained by the court in these two cases is correct, particularly where it construes a statute pertaining to the jurisdiction of the Secretary of the Interior, who uniformly maintained a much broader construction, yet it is not necessary, we believe, to enter into a discussion of this question in the present case.

The award of the Secretary in this case is not in the record. It appears, however, that he allowed the claim against the "Cheyenne tribe or nation of Indians" for depredations committed in the summer of 1867. It does not appear what, if any, band or member of the tribe committed the depredation.

Where the jurisdiction of the Secretary is questioned, it must appear affirmatively that he did not have the right to make the award, and every reasonable intendment is in favor of his jurisdiction.

The treaty of 1865 does not purport to be entered into by the entire tribe. It purports to be a treaty with "the confederate tribes of Arapahoe and Cheyenne Indians of the Upper Arkansas River," and contains a stipulation (article 8) wherein the Indians, parties thereto, agree to "use their utmost endeavor to induce that portion of the tribe not now present to unite with them and accede to the provisions of this treaty."

Nothing appears to show that the others, members or bands, ever did join with those signing the treaty; nothing is here to show what bands were parties and what bands were not, excepting certain very interesting deductions which may be drawn by comparison of the signatures to this treaty and that of October 28, 1867 (15 Stat. L., 593).

It is a recognized rule of law that when the United States has entered into and recognizes a treaty, its validity cannot be questioned collaterally in such a proceeding as this. Yet

when a treaty as made, ratified, and proclaimed does not purport to be binding upon the whole tribe; when it recognizes the existence of others not party to it and not bound by it, it cannot be construed as obligatory upon those not present or represented unless it be shown that the conditions precedent to their liability have been fulfilled.

By a treaty with the whole Cheyenne tribe, preceding that of 1865—the Fort Laramie treaty of September 17, 1851—the Cheyenne tribe agreed to pay for depredations committed by any band or individual of their people. This treaty has been considered by the Court of Claims in the Moore Case, 32 C. Cls., 593, and held to constitute such a treaty provision for payment as authorized the allowance of claims by the Secretary.

Where, therefore, there was a treaty with the whole tribe agreeing to make compensation, and a later one with part of the tribe without this provision, we submit that an allowance was justified.

Respectfully submitted,

J. H. Ralston,
F. L. Siddons,
W. E. Richardson,
Attorneys for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

JARIB L. SANDERSON, SURVIVING PARTNER of the firm of Barlow, Sanderson & Company, appellant,
v.
THE UNITED STATES ET AL. } No. 576.

MOTION TO ADVANCE.

Comes now the Solicitor-General, on behalf of the appellees in the above-entitled cause, and moves the court to advance the same on the docket and set it down for hearing on such day during the next term as shall be convenient to the court.

This is a case arising under the Indian depredation act, in which the Court of Claims rendered a judgment in favor of the claimant on the 11th day of October, 1892, for the sum of $7,740. Afterwards, and within two years from that date, a motion for a new trial was filed by the United States under the provisions of section 1088, Revised Statutes. This motion was allowed by the court after the expiration of more than two years

from the date of the judgment, and the claimant's petition was finally dismissed.

The question involved in the appeal relates to the construction of the statute under which the motion for a new trial was filed, the appellant contending that the Court of Claims has no power to allow such a motion after two years. There are a number of other cases, involving considerable amounts of money, the final disposition of which depends upon the decision in this case.

Opposing counsel concur in this motion.

HENRY M. HOYT,
Solicitor-General.

MAY, 1907.

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